Supreme Court, U.S.
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No. 97-988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BARNEY QUILTER, *et al.*,
Appellants,

v.

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

In this case, the majority of the three-judge federal district court, acting on remand from this Court, held that the 1991 reapportionment of the Ohio General Assembly did not violate the Equal Protection Clause of the Fourteenth Amendment. The questions presented on this appeal are:

1. Did the district court properly rule that strict scrutiny was not triggered to review the 1991 reapportionment of the Ohio General Assembly because Plaintiffs-Appellants failed to establish that race was the predominant factor motivating Defendants-Appellees' drawing of district lines?

2. Did the district court properly conclude that Plaintiffs-Appellants lacked standing to challenge four Ohio House Districts because none of them resided in those districts?

LISTING OF ADDITIONAL PARTIES

Appellants

THOMAS E. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, and WILLIAM MALLORY.

Appellees

STANLEY J. ARONOFF, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

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MOTION TO AFFIRM

This is the third time that this litigation, which is now in its seventh year, has been before this Court. Following this Court's second remand, the district court correctly applied the principles laid down by this Court's decisions and rejected the Plaintiffs-Appellants' challenge to the 1991 redistricting of the Ohio General Assembly. That decision of the court below presents no issue worthy of plenary review. The judgment of the district court should, therefore, be summarily affirmed, and this lengthy litigation brought, at last, to an end.

STATEMENT OF THE CASE

Pursuant to Article XI, § 1 of the Ohio Constitution, the Ohio Apportionment Board [1] convenes every ten years

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[1] The Ohio Constitution does not actually create an "Apportionment Board," but rather provides that the Governor, Secretary of

in the year following the decennial census. Ohio Const., Art. XI, § 1; App. at 246a. The 1991 Apportionment Board, consisting of Defendants-Appellees Governor George V. Voinovich, Secretary of State Robert A. Taft, Jr., and then Ohio Senate President Stanley J. Aronoff, and two of the Plaintiffs-Appellants, then Auditor of State Thomas E. Ferguson and then Speaker Pro Tempore of the Ohio House of Representatives Barney Quilter, convened on August 22, 1991. D. 147, Ex. A at 1, 4. The "tortuous history," see *Quilter X*, 981 F. Supp. at 1035, App. at 2a, of the litigation challenging the 1991 Apportionment Board's actions now spans nearly 6½ years since this first meeting of the Board.[2]

State, Auditor of State, and two persons chosen by the legislative leaders "shall be the persons responsible for the apportionment of this state for members of the general assembly." Ohio Const., Art. XI, § 1. For ease of reference, these apportioning persons will hereinafter be referred to as the "Apportionment Board" or the "Board."

[2] To avoid some of the confusion resulting from this "tortuous history," Appellees will refer throughout this Motion to the numerous decisions of the district court as follows:

Quilter I	*Quilter v. Voinovich*, 794 F.Supp. 695 (N.D. Ohio Jan. 31, 1992)
Quilter II	*Quilter v. Voinovich*, 794 F.Supp. 756 (N.D.Ohio March 10, 1992)
Quilter III	*Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145 (N.D.Ohio March 19, 1992)
Quilter IV	*Quilter v. Voinovich*, 794 F.Supp. 760 (N.D.Ohio May 5, 1992)
Quilter V	*Quilter v. Voinovich*, 857 F.Supp. 579 (N.D.Ohio March 31, 1994)
Quilter VI	*Quilter v. Voinovich*, 157 F.R.D. 36 (N.D.Ohio March 31, 1994)
Quilter VII	*Quilter v. Voinovich*, 5:91CV-2219, App. 160a (N.D. Ohio April 28, 1995)
Quilter VIII	*Quilter v. Voinovich*, 5:91CV-2219, 1995 WL 681182, App. 113a (N.D.Ohio May 26, 1995)
Quilter IX	*Quilter v. Voinovich*, 912 F.Supp. 1006, App. 63a (N.D.Ohio Aug. 11, 1995)
Quilter X	*Quilter v. Voinovich*, 981 F.Supp. 1032, App. 1a (N.D.Ohio Aug. 22, 1997)

At the initial meeting, the Board elected Governor Voinovich as its Chairman, D. 123 at 8, and appointed Defendant-Appellee James R. Tilling, the then Chief Executive Officer of the Ohio Senate, as its Secretary. D. 147, Ex. A at 2. Following the initial meeting, Voinovich, Taft, and Aronoff directed Tilling to draft and submit a plan on behalf of the majority members of the Apportionment Board. D. 154, Ex. 15 at 90; D. 75 at 11; D. 102 at 11; D. 123 at 7-8. Tilling was directed to submit a plan that complied with the Ohio Constitution, the United States Constitution, and the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* D. 154, Ex. 15 at 90; D. 75 at 13; D. 123 at 9. The majority members of the Board stressed to Tilling that the preservation of county and political subdivision boundaries was an important goal in drafting the plan. D. 154, Ex. 15 at 91-92.

Tilling submitted his plan, *which contained nine majority-minority districts,* to the Board on September 26, 1991. On October 1, 1991, after consultations with groups representing the minority community in Cuyahoga County, the Board amended and adopted the Tilling plan. D. 154, Ex. 16 at 2-12, 29-32. The Board reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan adopted on October 3, 1991, was labeled as "Amendment C." D. 154, Ex. 17 at 9-14. *Amendment C contained only eight majority-minority house districts.*

On November 1, 1991, Plaintiffs-Appellants commenced this action in the district court alleging violations of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D. 1.[3] On January 31, 1992, the district court issued its

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[3] In their Jurisdictional Statement, Appellants falsely asserted that their complaint alleged "that the Board's conscious use of race in redistricting violated the Voting Rights Act . . ., and the Fourteenth and Fifteenth Amendments to the United States

Opinion and Order, declaring that Amendment C violated § 2 of the Voting Rights Act because the Board had failed to justify the inclusion in the plan of several majority-minority districts. *Quilter I*, 794 F. Supp. at 700-01.[4] The district court majority remanded Amendment C to the Board with instructions to justify the majority-minority districts included in the plan. *Quilter I*, 794 F. Supp. at 701-02.

On February 14, 1992, the Ohio Supreme Court issued its decision upholding Amendment C against state constitutional attacks, *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), and a majority of the Court directed the Board to make technical corrections to the plan, *Id.* at 202, 205, 214. On February 18, 1992, the Board reconvened and made these corrections, D. 147, Ex. C at 59; D. 147, Ex. A at 107, and the plan, as amended, was labeled "Amendment D." D. 147, Ex. A. at 107. Also, on February 18, 1992, the Board adopted "Findings and Conclusions," which, in the view of a majority of the Board, complied with the district court's order to "justify"

Constitution." Jurisdictional Statement at 4. As this Court noted in its decision in *Voinovich v. Quilter*, 507 U.S. 146 (1993), however, Appellants challenged not the consideration of race, but rather *how* race was considered. 507 U.S. at 150 ("In [plaintiffs'] view, the plan should have created a larger number of 'influence' districts —districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice.") (citation omitted). It was only following this Court's remand in *Voinovich* and subsequent decision in *Shaw v. Reno*, 509 U.S. 630 (1993), that Appellants asserted that Appellees could not be race-conscious in crafting an apportionment plan.

[4] The district court expressly abstained on the Ohio Constitutional issues, noting that these issues were then pending before the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). *Quilter I*, 794 F.Supp. at 702. The district court has generally adhered to its initial decision to abstain on state constitutional issues. See *Quilter VII*, App. at 163a n.3; *Quilter IX*, 912 F.Supp at 1026, 1029-30 n.17, App. at 96a, 102a n.17; *Quilter X*, 981 F.Supp. at 1048 n.15, App. at 32a n.15.

the inclusion of majority-minority districts under both Amendment C and Amendment D. D. 147, Ex. A.[5]

As set forth in the Board's Findings and Conclusions. the technical corrections, which became Amendment D, resulted in *a reduction from eight to five majority-minority house districts*. D. 147, Ex. A at 108-09. Four of the five majority-minority districts contained in Amendment D are located in Cuyahoga County and have never been challenged by the Appellants herein. As explained by Tilling at the Apportionment Board meeting of February 11, 1992:

> The changes that are made in the urban counties result only from going into the plan and trying to remove splitting of more than one political subdivision between districts; nothing more, nothing less. * * * Representative Mallory, who came before this Board and asked that he not be given additional blacks, the plan that we passed by the Board on October the 1st, Representative Mallory had 59.3 percent black population. The current plan has 47.26. And again, I want to make it clear, because that is a very significant decrease, and you can look at it on the map and you'll see exactly what we're talking about. That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. *But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.*

D. 147, Ex. B at 84-87 (emphasis added).[6]

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[5] As the district court majority held in its August 22, 1997, decision at issue herein, "[t]he Board's (perhaps disproportionate) focus on racial considerations in [its] findings . . . is hardly surprising . . ." given that court's January 31, 1992, mandate to "justify" all of the majority-minority districts contained in the plan. *Quilter X*, 981 F.Supp. at 1048, n.14, App. at 31a n.14.

[6] The district court later recognized that Amendment D's technical corrections largely involved reuniting split political subdivisions. *Quilter IV*, 794 F.Supp. at 763. See D. 192; D. 313 at 4A-20A.

On March 10, 1992, the district court again ruled that Amendment D violated § 2 of the Voting Rights Act because the Board had failed to "justify" the five majority-minority districts contained therein. *Quilter II*, 794 F. Supp. at 757. The court also concluded that the plan violated the Fifteenth Amendment, *id.* at 757, and, in a subsequent opinion, the Fourteenth Amendment's one person-one vote requirement. *Quilter III*, 1992 WL 677145 at *10.

On March 2, 1993, this Court unanimously reversed. *Voinovich v. Quilter, supra.* With regard to § 2 of the Voting Rights Act, the Court found that the district court had improperly shifted the burden of proof to the apportioning officials to justify their creation of minority-controlled districts, which impermissibly interfered with the State's authortiy to apportion its own legislature. 507 U.S. at 155-56. The Court further concluded that even had the district court properly placed the burden of proof on Plaintiffs, they could not have proven a violation of § 2. 507 U.S. at 158. The Court also reversed the lower court's findings that Amendment D violated the Fourteenth and Fifteenth Amendments. 507 U.S. at 158-61. The Court remanded the case "only for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 507 U.S. at 152.

On remand, the district court unanimously ruled "that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause . . .," *Quilter V*, 857 F. Supp. at 587, but nevertheless permitted the Appellants to file a second amended complaint challenging Amendment D under this Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), and to assert, for the first time, that the Board's consideration of race as a factor was itself unlawful. *Quilter VI*, 157 F.R.D. at 37.[7]

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[7] This Court denied, without opinion, the Appellees' subsequent petition for a writ of mandamus directing the district court to limit

The case was tried on remand on November 16 and 17, 1994. Appellants' only witness on remand attempted, but failed, to establish that Appellees ignored the traditional districting principles embodied in Article XI of the Ohio Constitution.[8]

In an effort to show an improper racial motive, Appellants introduced as evidence Tilling's handwritten notes, which Appellants asserted established that he drew the "minority districts" first in each of Ohio's urban counties. D. 104, Ex. 120. Tilling, however, testified that his handwritten notes dealt with versions of the plan of apportionment that predated Amendment D and described his drafting of an apportionment plan that maximized the number of majority-minority districts. D. 312 at 335.

The plan referred to in Tilling's notes was never adopted by the Board and was never in effect for any election. As established by the transcripts of the Apportionment

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itself to the scope of the remand. *In re Voinovich*, 511 U.S. 1126 (1994).

[8] Specifically, Appellants sought to establish that Appellees failed to retain districts from the 1981 apportionment plan as required by Article XI, § 7(D), of the Ohio Constitution. See D. 347, Ex. 17. On cross-examination, however, Appellants' "expert" witness admitted that his suggestion that most districts should have been retained was "quite misleading," D. 311 at 119, and "flat out wrong." D. 311 at 127. Moreover, Appellants' purported "expert" acknowledged that to retain prior districts, one would have to consider ward and precinct boundary changes since 1980, but admitted that he had performed no analysis of such changes. D. 311 at 129. In fact, it was established at trial that because house districts must be drawn along ward and precinct lines, see Ohio Const., Article XI, §§ 6 & 7(C), App. at 248a-249a, and because there have been numerous alterations in these lines since 1981, "enormous changes [were] necessar[y]" in house and senate district lines. D. 312 at 231-32. See n.15, *infra*. Although Appellants purported "expert" also asserted that the Board had violated other provisions of Article XI and created bizarrely-shaped districts, Appellants abandoned these assertions on the most recent remand from this Court, see D. 374 at 88-89, and have not raised them in their Jurisdictional Statement herein.

Board meetings, the "model" plan first submitted by Tilling on September 26, 1991, was modified on numerous occasions: (1) at the September 30, 1991, Board meeting, D. 154, Ex. 15 at 107-18, (2) at the October 1, 1991, Board meeting, D. 154, Ex. 16 at 29-32, (3) at the October 3, 1991, Board meeting, D. 154, Ex. 17 at 9-15, and (4) at the February 18, 1992, Board meeting, where Amendment D was adopted. D. 147, Ex. C.

In his "model" plan, Tilling demonstrated that it was possible to create nine majority-minority house districts for the Ohio General Assembly. Yet, Amendment D contained only five such districts. Amendment D is the only plan that has ever been effective for an election in Ohio, and thus the handwritten notes are irrelevant.

Tilling affirmatively testified that the majority of the Apportionment Board instructed him to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act." D. 312 at 208. Compliance with that instruction, Article XI, § 3's requirement of population equality, and the other requirements of the Ohio Constitution, were the predominant factors used in drafting Amendment D. D. 312 at 252-53.

On April 28, 1995, the district court ruled that eight (8) of ninety-nine (99) Ohio House districts "violate the Equal Protection Clause of the Fourteenth Amendment." *Quilter VII*, App. at 197a. The majority concluded that these eight districts, HD21, HD22, HD30, HD31, HD38, HD39, HD44, and HD49, had been racially gerrymandered "[b]ecause race was a substantial and motivating factor" in their creation. *Quilter VII*, App. at 193a. The court ordered Appellees to redraw the eight districts. *Quilter VII*, App. at 198a. Judge Dowd again dissented. *Quilter VII*, App. at 199a.

On May 26, 1995, the majority members of the district court's panel issued an order vacating the April 28, 1995,

decision, D. 325, and issued an amended decision with significant changes. *Quilter VIII*, App. at 113a. In the May 26, 1995, decision, the district court majority again found that race was "a substantial and motivating factor" in the creation of eight house districts. *Quilter VIII*, App. at 149a. In response to Judge Dowd's April 28, 1995, dissenting opinion, however, the majority abandoned its long-standing decision to abstain on state constitutional issues and found that the Board had violated Article XI, § 7(D) of the Ohio Constitution by not retaining more districts from the prior apportionment. *Quilter VIII*, App. at 154a-157a n.19.

On August 11, 1995, notwithstanding Appellees' prior perfection of their appeal to this Court, the district court once again vacated its opinion, and issued a new opinion "to incorporate in [its] Opinion relevant analysis from [this] Court's *Miller decision*." D. 341 at 2. See *Miller v. Johnson*, 515 U.S. 900 (1995).[9] In its April 28, 1995, and May 26, 1995, decisions, the majority of the district court expressly rejected the "predominant motivating factor" standard as the trigger for strict scrutiny. *Quilter VII*, App. at 174a-175a; *Quilter VIII*, App. at 128a-130a. In this new Opinion, however, the district court majority ruled for the first time that race *was* the "predominant" factor motivating the adoption of Amendment D, *Quilter IX*, 912 F. Supp. at 1027, App. at 97a, even though it did not find that Appellees had disregarded any traditional districting principle:

> [A] plaintiff may satisfy the predominant factor test and prove that traditional districting principles were subordinated to racial objectives not only when a state violates or abandons traditional districting prin-

[9] Interestingly, the district court majority did not incorporate in its opinion the relevant analysis from this Court's decision in *United States v. Hays*, 515 U.S. 737 (1995), which was decided on the same day as *Miller*. Under the *Hays* decision, Appellants lacked standing to challenge four of the eight house districts at issue here.

> ciples in favor of racial motivations but also when a state substantially complies with traditional districting principles and gives them less weight in the apportionment process than racial considerations.

Quilter IX, 912 F. Supp. at 1019, App. at 79a-80a (citation omitted). Indeed, the district court majority readily assumed that Amendment D complied with all traditional districting principles. *Quilter IX*, 912 F. Supp. at 1026, App. at 95a-96a.

On June 13, 1996, this Court issued its decisions in *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996), and *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996). On June 24, 1996, the Court issued the following order in the present litigation:

> The judgment is vacated and the case is remanded to the United States District Court for the Northern District of Ohio for further consideration in light of *Bush v. Vera*, 517 U.S. — (1996) and *Shaw v. Hunt*, 517 U.S. —— (1996).

Voinovich v. Quilter, 116 S. Ct. 2542 (1996).

The case was argued on remand before the district court without further evidence. D. 374. On August 22, 1997, the district court issued its decision upholding Amendment D. *Quilter X*, 981 F. Supp. at 1051, App. at 39a. Initially, the court unanimously ruled that Appellants lacked standing to challenge four of the eight house districts previously declared invalid in the court's three 1995 opinions. *Quilter X*, 981 F. Supp. at 1038, App. at 10a; *Quilter X*, 981 F. Supp. at 1051 n.1, App. at 39a n.1 (Jones, J., dissenting on other grounds).[10]

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[10] Specifically, the district court ruled that the Appellants lacked standing to challenge HD21, HD22, HD30, and HD38 because none of them resided in any of the districts. Significantly, none of the four remaining districts (HD31, HD39, HD44, and HD49) is a majority-minority district. D. 147, Ex. A at 108-09; *Quilter X*, 981 F.Supp. at 1048 n.13, App. at 30a n.13.

In addressing the merits of Appellants' equal protection claim, the district court majority, in restating the trigger for strict scrutiny, followed this Court's precedent in holding "that because the plaintiffs have failed to make a threshold showing that the defendants subordinated traditional districting principles to consideration of race, strict scrutiny of the challenged districts is not applicable." *Quilter X*, 981 F. Supp. at 1035, App. at 1a. Accordingly, the district court majority applied the "rational basis" level of Fourteenth Amendment scrutiny, and concluded that Amendment D did not violate the Equal Protection Clause. *Quilter X*, 981 F. Supp. at 1050-51, App. at 35a-38a.[11]

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. INTRODUCTION.

In an effort to convince this Court that this case raises substantial constitutional questions, Appellants suggest that plenary review is required to resolve purported confusion over whether compliance with traditional districting principles precludes the triggering of strict scrutiny. Appellees respectfully maintain that this case presents no such "confusion." [12] The district court majority concluded

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[11] In their Jurisdictional Statement, Appellants assert only that the district court erroneously failed to invoke strict scrutiny in this case. They do not challenge the district court's analysis under the "rational basis" level of scrutiny.

[12] Any "confusion" over the district court's decision has been created solely by Appellants' inaccurate description of the decision below. For example, Appellants assert that this case presents the "question of whether a districting plan is unconstitutional if race was the primary factor considered by the drafters, yet the challenged districts coincidentally are compact and adhere to other (but not all) traditional districting principles." Jurisdictional Statement at 8. Of course, the district court did not hold, or even suggest, that "race was the primary factor considered by the drafters" of Amendment D. Rather, the court below held, in clear and unmistakable

that race was not the predominant factor motivating the drawing of the four house districts at issue herein. That conclusion was grounded not only upon Amendment D's adherence to traditional districting principles, but also upon a lack of evidence suggesting that "[r]ace was the criterion that . . . could not be compromised . . . ." *Shaw v. Hunt*, 116 S. Ct. at 1901. See App. at 31a

In light of record evidence overwhelmingly supporting the district court's decision, plenary review of that decision is not warranted Such review could only mire this Court in a fruitless search for small scraps of evidence to support a claim that Plaintiffs have been unable to prove in over six years of litigation.

A majority of "[t]he District Court concluded that [the apportionment plan] did not subordinate traditional districting principles to race. That finding is subject to review for clear error." *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194 (1997) (citations omitted). Appellees maintain that the district court majority did not commit clear error—indeed, it did not commit *any* error —and this Court should, therefore, summarily affirm that court's decision.

II. THE DISTRICT COURT PROPERLY HELD THAT "RACE" WAS NOT THE PREDOMINANT FACTOR MOTIVATING THE DRAFTING OF OHIO HOUSE OF REPRESENTATIVES DISTRICTS 31, 39, 44, AND 49.

In *Shaw v. Reno, supra*, this Court concluded that plaintiffs challenging a redistricting scheme may state "a claim under the Equal Protection Clause by alleging that the [state] adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts

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terms, that the Plaintiffs had failed to show "that race was the *predominant* factor, the criterion that could not be compromised." *Quilter X*, 981 F.Supp. at 1048, App. at 31a (emphasis in original).

because of their race, and that the separation lacks sufficient justification." *Shaw v. Reno,* 509 U.S. at 658. The Court further held that consciousness or awareness of race when redistricting, in and of itself, does not violate the Equal Protection Clause of the Fourteenth Amendment:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. * * * [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territoy, or to maintain the integrity of political subdivisions.

Shaw v. Reno, 509 U.S. at 646 (citations omitted) (emphasis in original).

In *Miller v. Johnson, supra,* the Court clarified its decision in *Shaw v. Reno,* and held that the good faith of the state in redistricting must be presumed in the absence of a sufficient showing to the contrary:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter into a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race *predominates* in the redistricting process. * * * The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that *race was the predominant factor motivating the legislature's decision* to place a significant number of voters

> within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Miller v. Johnson, 515 U.S. at 915-16 (citations omitted) (emphasis added).[13]

A year after its decision in *Miller*, this Court again cautioned lower courts against invalidating state districting plans simply because the drafters were conscious of race:

> Applying traditional equal protection principles in the voting-rights context is "a most delicate task," however, because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts. The constitutional wrong

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[13] In a separate concurring opinion, Justice O'Connor stated:

> I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. *To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.* Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. * * *
>
> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may have well been considered in the redistricting process.

Miller v. Johnson, 515 U.S. at 928-29 (O'Connor, J., concurring) (emphasis added) (citations omitted).

> occurs when race becomes the "dominant and controlling" consideration.

Shaw v. Hunt, 116 S. Ct. at 1900 (citations omitted).

> Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts. Electoral district lines are "facially race neutral," so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of "classifications based explicitly on race." For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. By that, we mean that race must be "*the predominant* factor motivating the legisture's [redistricting] decision."

Bush v. Vera, 116 S.Ct. at 1951 (plurality opinion) (emphasis in original) (citations omitted).[14]

Within the framework of this Court's decisions in *Shaw v. Reno*, *Miller*, *Bush*, and *Shaw v. Hunt*, the district court properly determined that strict scrutiny was not triggered in this case. As this Court has itself previously acknowledged, the Appellees herein, in an effort to comply with the Voting Rights Act, considered race as one of many factors in drafting Amendment D. *Voinovich v. Quilter*, 507 U.S. at 159. But Appellees did not *sub-*

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[14] Justice O'Connor, who authored the Court's plurality opinion in *Bush v. Vera*, also filed a concurring opinion in which she stated:

> [S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply.

Bush v. Vera, 116 S.Ct. at 1969 (O'Connor, J., concurring) (emphasis in original) (citations omitted).

ordinate, disregard, compromise, or neglect any traditional districting principle in favor of racial considerations.[15]

Appellants offered no credible evidence that Amendment D was "race-based." Rather, Appellants established only a fact not in dispute, *i.e.*, that Tilling was conscious of the racial make-up of the districts he drew. Indeed, when Amendment D was adopted, Tilling explained in detail the effect Amendment D would have on the racial

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[15] Indeed, the Ohio Supreme Court concluded that "the plan," with the exception of technical errors, complied with the Ohio Constitution. *Voinovich v. Ferguson*, 63 Ohio St.3d at 200. As both the Supreme Court and the district court noted, Defendants corrected the technical errors and the corrections became Amendment D, see *Voinovich v. Quilter*, 507 U.S. at 151; *Quilter IV*, 794 F.Supp. at 763; *Quilter IX*, 912 F.Supp. at 1012, the only plan of apportionment adopted by the Appellees that has ever been used in an Ohio General Assembly election. Despite the district court's reluctance to accept the Ohio Supreme Court's decision as conclusive on this issue, see *Quilter X*, 981 F.Supp. at 1046-47, App. at 27a-29a, it nevertheless determined that "there is no evidence . . . to suggest that the defendants disregarded traditional districting principles at all, let alone 'utterly.'" *Quilter X*, 981 F.Supp. at 1049, App. at 34a.

The only such principle Appellants now weakly maintain was disregarded was the Ohio Constitution's instruction to retain prior districts where possible. Ohio Const., Art. XI, § 7(D); App. at 249a. The district court found it unnecessary to determine whether Appellees had complied with this provision because there was no evidence suggesting that any noncompliance that may have occurred was due to Appellees' consideration of race. *Quilter X*, 981 F.Supp. at 1048, App. at 32a. The district court majority also expressed doubt that any failure to comply with only one of more than a dozen state constitutional districting rules (if proven) could rise to a federal constitutional violation. *Quilter X*, 981 F.Supp. at 1048, App. at 31a.

In any event, Appellees conclusively demonstrated below that districts from the 1981 apportionment could not have been retained without violating a host of Article XI's other districting requirements. D. 350, Ex. A at 15-18. See n.7, *supra*. The Ohio Supreme Court has ruled that, when two or more provisions of Article XI are in conflict, the Apportionment Board alone has the discretion "to choose the proper course." *Voinovich v. Ferguson*, 63 Ohio St.3d at 200.

make-up of several districts, but noted that the result was required to achieve compliance with the Ohio Constitution. Tilling's comments, which bear repeating here, are excerpted in the margin.[16]

The Appellees' steadfast adherence to the requirements of Article XI of the Ohio Constitution conclusively demonstrates that it was Article XI, and not race, that "was the criterion that . . . could not be compromised." *Shaw*

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[16] Tilling stated:

> The changes that are made in the urban counties result only from going into the plan and trying to remove splitting of more than one political subdivision between districts; nothing more, nothing less. And I would point out—and I know that the counsel for the other side is aware of this because many of these examples were given to us in the deposition provided by Bob Dykes, and we found some in our analysis where we had essentially split more than one political subdivision between districts. And so in going back and correcting that—and that's what these maps and corresponding charts reflect—that's why this plan is labeled as it is. It is the plan adopted by the Apportionment Board on October the 3rd with these technical corrections, and they are entirely, with the exception of Marion County, changing ward boundaries to make only one split between districts. All right? That's all it is. There's no ulterior motive. There's no skulduggery involved here.
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> * * * *
>
> Representative Mallory, who came before this Board and asked that he not be given additional blacks, the plan that we passed by the Board on October the 1st, Representative Mallory had 59.3 percent black population. The current plan has 47.26. And again, I want to make it clear, because that is a very significant decrease, and you can look at it on the map and you'll see exactly what we're talking about. That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. *But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.* There is a significant difference in minority population in some areas. And we would appreciate input from the minority community on this.

D. 147, Ex. B at 84-87 (emphasis added).

v. Hunt, 116 S.Ct. at 1901. Under no circumstances can race be considered to have been the "predominant factor" motivating the drawing of the four house districts at issue herein, *i.e.*, HD31, HD39, HD44, and HD49.

In support of their unwarranted assertion that race was "the predominant motivating factor" in drafting Amendment D, Appellants direct this Court's attention to only three items: (1) Tilling's handwritten notes recorded at the time he made his first draft of an apportionment plan, D. 104, Ex. 120, (2) the Board's Findings and Conclusions adopted following the district court's January 31, 1992, decision ordering the Board to "justify" Amendment C, D. 147, Ex. A, and (3) Chairman Robert T. Bennett's September 26, 1991, cover letter submitting the Ohio Republican Party's proposed apportionment plan to the Board for consideration. D. 107, Ex. 1; D, 149, Ex. 79. None of these items supports Appellants' assertion.

As to Tilling's notes, he testified at trial that the plan described in those notes was not the plan of apportionment now in effect for Ohio's General Assembly. D. 312 at 335. That plan was never adopted by the Board and was never in effect for any election. As established by the transcripts of the Apportionment Board meetings, the "model" plan first submitted by Tilling on September 26, 1991, was modified on numerous occasions.[17] Amendment

[17] As noted above, the plan described in Tilling's notes underwent extensive transformations: (1) at the September 30, 1991, Board meeting, D. 154, Ex. 15 at 107-18, (2) at the October 1, 1991, Board meeting, D. 154, Ex. 16 at 29-32, (3) at the October 3, 1991, Board meeting when Amendment C was adopted, D. 154, Ex. 17 at 9-15, and (4) at the February 18, 1992, Board meeting, when Amendment D was adopted. D. 147, Ex. C. As the court below long ago noted, " 'the technical corrections' were so extensive and pervasive that the resulting document [Amendment D] constituted a new plan . . . ." *Quilter IV*, 794 F.Supp. at 761-62. The attempt of the Appellants and the dissent below to characterize Tilling's initial model plan as "a not-too-distant forerunning of" Amendment D, *Quilter IX*, 912 F.Supp. at 1026, App. at 95a, and thereby elevate Tilling's notes to the status of "substantial direct evidence of race-based line drawing," Jurisdictional Statement at 3-4, is, therefore, completely unpersuasive.

D is the only plan that has ever been effective for an election in Ohio. Thus, the handwritten notes are not probative of the issues in this case.

To the extent Tilling's notes have any relevance, they establish that race was *not* "the predominant motivating factor" in drawing the districts contained *in Amendment D*. As Tilling explained at trial, he formulated his "model" plan to determine how many majority-minority districts could be created so that he could use that plan as a benchmark to judge all plans submitted to the Board. D. 312 at 335. Under this "model," Tilling created nine majority-minority districts, but Amendment D contains only five such districts. Furthermore, when the adoption of Amendment D reduced the number of minority districts to five, Tilling explained that the sole, *and uncontradicted*, reason for that adoption was to comply with the provisions of Article XI of the Ohio Constitution. D. 147, Ex. B at 87. This explanation establishes that the requirements of the Ohio Constitution predominated over race in drafting Amendment D. Thus, race was not "the predominant motivating factor" in the drafting of Amendment D. Unlike the North Carolina Congressional districts at issue in *Shaw v. Hunt*, it was the traditional districting principles embodied in Article XI of the Ohio Constitution, and not racial concerns, that "could not be compromised." *Shaw v. Hunt*, 116 S.Ct. at 1901.

As to the Board's Findings and Conclusions entered on February 18, 1992, D. 147, Ex. A, they were adopted by the Board only after it was ordered by the district court on January 31, 1992, to "justify" its inclusion of majority-minority districts in Amendment C. *Quilter I*, 794 F. Supp. at 701-02. The district court majority properly noted that "[t]he Board's (perhaps disproportionate) focus on racial considerations in those findings, therefore, is hardly surprising . . . ." *Quilter X*, 981 F. Supp. at 1048 n.14, App. at 31a n.14. Thus, the Board's actions lend no support for the argument that traditional districting principles were neglected or subordinated to the

Board's consideration of race. Rather, when considered as a whole, they establish the Board's belief that its plan complied with *both* the traditional districting principles embodied in Article XI of the Ohio Constitution and the requirements of federal law. See *Voinovich v. Quilter*, 507 U.S. at 159.

Finally, with respect to Robert Bennett's September 26, 1991, letter, the majortiy below properly observed that the letter was irrelevant:

> Robert T. Bennett, the chairman of the Ohio Republican Party, did submit a plan to the Board on behalf of the party, and made a statement at a Board hearing that was substantially similar to a letter attached to that plan stating that the plan sometimes departed from the Ohio Constitution's requirements in favor of Voting Rights Act considerations. We note, however, that the Republican Party plan submitted by Bennett, and on which he based his remarks, was one of five proposed apportionment plans submitted to the Board, and was rejected by the Board. The Republican members of the Board submitted their own plan (which was not the Republican Party plan), drafted by Tilling, which the Board adopted. Comments made by Bennett in reference to a rejected plan, therefore, appear to have no relevance to the motivations behind the plan adopted by the Board and now before this court.

Quilter X, 981 F. Supp. at 1047 n.12, App. at 29a-30a n.12 (citations omitted). Appellants' effort to use this letter as evidence of Appellees' racial motives, without any indication that it did not refer to Amendment D *or any plan submitted by Appellees*, see Jurisdictional Statement at 23 n.28, is thus blatantly misleading.[18]

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[18] The dissenting opinion below implied that Bennett submitted "*the* plan" to the Board and that the Bennett cover letter was attached to it. *Quilter X*, 981 F.Supp. at 1052, App. at 41a (Jones, J., dissenting) (emphasis added). In a lengthy footnote, the dissent implicitly acknowledged that the Tilling plan was *not* the same as

Amendment D stands in stark contrast to the Congressional districts invalidated by this Court in *Miller*, *Shaw v. Hunt*, and *Bush*. All of the districts challenged by Appellants are wholly located within a county. In fact, no district with a significant black population crosses a county boundary.

Moreover, every Ohio house district fully complies with the provisions of Article XI of the Ohio Constitution. They are compact and contiguous, see Article XI, § 7(A), App. at 248a; they are created using the boundaries of political subdivisions and wards, see Article XI, § 6, App. at 248; they comply with the population requirements of the Ohio and United States Constitutions,

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the plan submitted by the Ohio Republican Party, but attempted to bind the plans together by reference to a document entitled "Republican Opportunities." *Quilter X*, 981 F.Supp. at 1052-53 n.4, App. at 41a-43a n.4. See D. 103, Ex. 86; D. 113, Ex. 1. This Court has, however, previously rejected the district court's former reliance on this document (in *Quilter III*):

> Second, the District Court cited Tilling's possession of certain documents that, according to the court, were tantamount to "a road-map detailing how [one could] create a racial gerrymander." Apparently, the District Court believed that Tilling, a Republican, sought to minimize the Democratic Party's power by diluting minority voting strength. The District Court, however, failed to explain the nature of the documents. Contrary to the implication of the District Court opinion, the documents were not a set of Republican plans for diluting minority voting strength. In fact, they were not even created by Tilling or the Republicans. They were created by a Democrat who, concerned about possible Republican manipulation of apportionment, set out the various types of political gerrymandering in which he thought the Republicans might engage. That Tilling possessed documents in which the opposing party speculated that he might have a discriminatory strategy does not indicate that Tilling actually had such a strategy. And nothing in the record indicates that Tilling relied on the documents in preparing the plan.

Voinovich v. Quilter, 507 U.S. at 159-60 (citations omitted). The dissent's effort to rely upon this document once again is, therefore, directly at odds with this Court's earlier explanation of the document.

see Article XI, §§ 3 & 4, App. at 247a; and not more than one political subdivision is divided between two districts, see Article XI, § 7(C), App. at 248a-249a. See *Voinovich v. Ferguson*, 63 Ohio St. 3d at 200; *Quilter X*, 981 F. Supp. at 1049, App. at 34a.

Finally, it must be stressed that unlike the Georgia General Assembly in *Miller*, and the North Carolina General Assembly in *Shaw v. Hunt*, the Ohio Apportionment Board did *not* seek to maximize the number of majority-minority districts. Indeed, as demonstrated by the plan described in Tilling's handwritten notes, it was possible to create nine majority-minority house districts. Yet Amendment D, the only plan ever in effect for an election in Ohio, contained only five majority-minority districts. And only *one* of the eight districts at issue herein (and none of the four that Appellees have standing to challenge) is a majority-minority district.

In this regard, the districts at issue herein are similar to the Florida Senate District approved by this Court just last term:

> The district is located entirely in the Tampa Bay area, has an end-to-end distance no greater than that of most Florida Senate districts, and in shape does not stand out as different from numerous other Florida House and Senate districts. While District 21 crosses a body of water and encompasses portions of three counties, evidence submitted showed that both features are common characteristics of Florida legislative districts, being products of the State's geography and the fact that 40 Senate districts are superimposed on 67 counties.
>
> Addressing composition, the District Court found that the residents of District 21 "regard themselves as a community." Evidence indicated that District 21 comprises a predominantly urban, low-income population, the poorest of the nine districts in the Tampa Bay region and among the poorest districts in

> the State, whose white and black members alike share a similarly depressed economic condition, and interests that reflect it. The fact that District 21 under Plan 386 is not a majority black district, the black voting-age population being 36.2%, supports the District Court's finding that the district is not a "safe" one for black-preferred candidates, but one that "offers to any candidate, without regard to race, the opportunity" to seek and be elected to office.
>
> Based on these and other considerations, the District Court concluded that traditional districting principles had not been subordinated to race in drawing revised District 21.

Lawyer, 117 S. Ct. at 2194-95 (footnotes and citations omitted).[19] See also *Abrams v. Johnson*, 117 S. Ct. 1925, 1933 (1997) (approving a court drawn plan that was "consistent with Georgia's traditional districting principles, and considering race as a factor but not allowing it to

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[19] Amendment D is also much like the California redistricting plan upheld in *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in part, dismissed in part*, 515 U.S. 1170 (1995). In that case, the district court concluded "that in the context of redistricting, where race is considered only in applying traditional districting principles along with the requirements of the Voting Rights Act, . . . strict scrutiny is not required." 856 F.Supp. at 1415. See also *Harvell v. Blytheville School Dist. No. 5*, 126 F.3d 1038, 1041 (8th Cir. 1997) ("Strict scrutiny does not apply, however, merely because majority-minority districts were intentionally created or the district lines were drawn with consciousness of race. There is a distinction between 'being aware of racial considerations and being motivated by them,' and the awareness of race does not mean that it predominated in the redistricting process. Where traditional districting principles such as compactness, contiguity, and respect for political subdivisions or communities with actual shared interests have not been subordinated to race, there is no equal protection violation.") (citations omitted); *Theriot v. Parish of Jefferson*, 966 F.Supp. 1435, 1447 (E.D.La. 1997) ("While race, through the force of § 2 of the Voting Rights Act, provided the genesis for the majority-minority district, it did not dictate the eventual boundaries of District 3.")

predominate").[20] Drawing district lines that take into consideration the existence of concentrated minority populations in urban areas, while observing state constitutionally-mandated, race-neutral districting criteria, simply does not invoke strict scrutiny under the Fourteenth Amendment. This Court has never held otherwise.

From the foregoing, it is clear that race was not the predominant motivating factor used by the Board in drafting Amendment D. Thus, this Court should summarily affirm the decision of the district court.

III. PLAINTIFFS-APPELLANTS HAVE FAILED TO ESTABLISH ANY ERROR IN THE RULING BELOW THAT NONE OF THEM SUFFERED A COGNIZABLE INJURY UNDER THE FOURTEENTH AMENDMENT WITH REGARD TO FOUR OF THE EIGHT CHALLENGED DISTRICTS.

Appellants also assert that the district court erred by ruling that they lacked standing to challenge four of the eight districts at issue in this case. In so asserting, Appellants do not suggest that the district court misinterpreted or misapplied this Court's precedents, but rather, that this Court should "clarify" its decisions addressing standing to challenge state legislative redistricting determinations. Jurisdictional Statement at 24-25. Appellees respectfully maintain that there is no ambiguity in this Court's decision in *United States v. Hays, supra, Bush v. Vera, supra*, and *Shaw v. Hunt, supra*, and that this Court should, therefore, affirm the district court's determination

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[20] In *Abrams*, both the district court and this Court observed that:

> [i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so.

Abrams, 117 S.Ct. at 1934 (citation omitted).

that Appellants lack standing to challenge HD21, HD22, HD30, and HD38.[21]

In *United States v. Hays*, this Court held that nonresidents of allegedly racially gerrymandered districts do not have standing under the Fourteenth Amendment to challenge those districts. *United States v. Hays*, 515 U.S. at 745. The Court further specifically ruled that even residents of adjoining districts do not have standing. Nonresidents of allegedly racially gerrymandered districts simply have not suffered "a cognizable injury under the Fourteenth Amendment." *Id.* at 746. Moreover, the Court concluded, the fact that plaintiffs sought to attack the redistricting plan as a whole was irrelevant to the standing analysis. Only those plaintiffs who live in an allegedly racially gerrymandered district have standing to challenge the validity of that district under the Fourteenth Amendment. *Id.*

In both *Shaw v. Hunt* and *Bush v. Vera*, this Court reaffirmed its conclusions in *Hays*. *Shaw v. Hunt*, 116 S.Ct. at 1900; *Bush v. Vera*, 116 S.Ct. at 1951. In *Shaw v. Hunt*, the Court expressly rejected the argument that Appellants make here, *i.e.*, that a plaintiff who resides in a challenged district has standing to challenge the entire districting plan:

> Two [plaintiffs] . . . live in District 12 and thus have standing to challenge that part of [the plan] which defines District 12. The remaining [plaintiffs] do not reside in District 1, however, and they have not provided specific evidence that they personally were assigned to their voting districts on the basis of race. Therefore, we conclude that only [the two plaintiffs] have standing *and only with respect to District 12*.

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[21] The unanimity of the decision below on the issue of standing itself belies Appellants' plea for further clarification of this Court's pronouncements on standing in legislative redistricting cases. For commentary recognizing the clarity of the *Hays* standing rule, see Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 Harv. L.Rev. 576, 580 n.20 (1997).

Shaw v. Hunt, 116 S.Ct. at 1900 (footnote and citations omitted) (emphasis added).

In the case at bar, none of the Appellants resides in HD21, HD22, HD30, or HD38, four of the districts challenged by Appellants.[22] Appellants offered no evidence of specific facts to support a finding that any of them were personally subjected to a racial classification with respect to those four districts. The district court, therefore, properly determined that Appellants lack standing to challenge the validity of HD 21, HD 22, HD30, and HD38.[23]

To avoid the clear holdings of *Hays*, *Bush*, and *Shaw v. Hunt*, Appellants assert that Plaintiffs-Appellants Quilter and Ferguson, dissenting members of the 1991 Apportionment Board, have standing to challenge the constitutionality of the plan. Incredibly, Appellants make this bold assertion by citing *Coleman v. Miller*, 307 U.S. 433 (1939), but without any reference to this Court's decision last term in *Raines v. Byrd*, 117 S.Ct. 2312 (1997). In *Raines*, this Court stated:

> It is obvious, then, that our holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.
>
> It should be equally obvious that appellees' claim does not fall within our holding in *Coleman*, as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to

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[22] Appellants do not question this finding.

[23] Significantly, there is no evidence in the record to suggest that the resolution of the merits of this case would be altered by addressing Appellants' claims on all eight of the challenged house districts. The district court's reasoning with respect to the four districts it addressed applies with equal force to the four districts that Appellants lacked standing to challenge.

> pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote. * * * *Coleman* thus provides little meaningful precedent for appellees' argument.

Id. at 2139-40 (citation and footnotes omitted).

In this case, like the legislators in *Raines*, Quilter's and Ferguson's votes on the Apportionment Board were not nullified, but were given full effect. They simply lost the vote adopting Amendment D. Accordingly, they have no standing to challenge the constitutionality of Amendment D.[24]

CONCLUSION

For the foregoing reasons, the judgment below should be summarily affirmed.

Respectfully submitted,

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[24] Furthermore, under Article XI, § 1, of the Ohio Constitution, App. at 246a, the members of the Apportionment Board are defined by the offices they occupy, and Quilter and Ferguson no longer hold the offices of Speaker Pro Tempore of the Ohio House of Representatives and Auditor of State. They are, therefore, no longer members of the Ohio Apportionment Board.